

CHIKOMBA RURAL DISTRICT COUNCIL  
versus  
KENNETH MUNDOPA  
and  
DEPUTY SHERIFF CHIVHU

HIGH COURT OF ZIMBAWE  
MUTEMA J  
HARARE, 27 January, 2012

### **Urgent Chamber Application**

*DC Kufaruwenga*, for the applicant  
*M Hungwe*, for the first respondent  
No appearance for the second respondent

MUTEMA J: When the parties appeared before me in chambers on 27 January, 2012, I directed their legal practitioners to file heads of argument before I could make a determination on the matter. This they have done. I had discerned that the resolution of the real dispute between the parties hinged on a point of law.

The dispute between the parties has its genesis in matters of employment. The first respondent, a state certified nurse was working at Chivhu General Hospital. There is a secondary dispute – not germane to the resolution of real dispute before me – of who the first respondent's employer was between the applicant and the Ministry of Health and Child Welfare (Ministry of Health).

The first respondent went awol/away from 27 October, 2008 to 11 March, 2010. The Ministry of Health constituted a board to investigate the matter which board recommended that the first respondent be charged with misconduct for absence from duty without good cause and be discharged from service. Thereafter the Ministry of Health charged the first respondent with the misconduct under the Health Services Regulations, 2006.

Whilst the misconduct charges were pending, the first respondent instituted his own proceedings against the applicant under s 93 of the Labour Act [*Cap 28:01*] (the Labour Act) alleging that the applicant, by preventing the first respondent from working, perpetrated an unfair labour practice. The labour officer referred the matter for compulsory arbitration in

terms of s 98 of the Labour Act. The arbitrator proceeded to make an award adverse to the applicant in the applicant's absence.

The applicant lodged an appeal against the arbitral award to the Labour Court. During the pendency of the appeal the first respondent registered the arbitral award in the High Court and took out a writ of execution against the applicant's property which the second respondent is in the process of executing. This galvanised the applicant into filing the urgent chamber application seeking a provisional order whose interim relief reads as follows:

“Pending the finalisation of the matter, the applicant is granted the following interim relief;

1.

That the first and second respondents are ordered to forthwith stop executing on the Arbitral Award No. 15/10 of the Honourable H Muchinako which was made on 2 June 2011 and registered with this Honourable Court on 13 December 2011 under Case No. HC 8852/11.

2.

In the event of the second respondent having removed the attached goods for sale in execution, the second respondent is directed to forthwith restore, replace and or deliver the attached goods back to the applicant's premises.”

It is common ground that the second respondent has attached the following property belonging to the applicant:

- (a) 2 x Massey Fergusson Tractors
- (b) 2 x four wheel trailers
- (c) 11 computer sets
- (d) 6 office desks
- (e) 4 x metal filing cabinets
- (f) CK 10 UD Truck

The nub of the legal argument founding the application is couched in these words:

“It has now been settled by this Honourable (sic) Court in the case of *Sibangilizwe Dhlodhlo v Deputy Sheriff Marondera & Ors* HH 76/2011 that an arbitral award is

incapable of enforcement, once an appeal has been noted against it. Consequently, the execution which the second respondent has embarked on, acting on the instructions of the first respondent, is forbidden by law.”

Following my directive that parties file heads of argument, they were in agreement in their respective heads of argument that four issues fell for determination. They are:

1. Is the matter urgent;
2. Is the applicant first respondent’s employer;
3. Is the applicant’s appeal against the arbitral award properly before the Labour Court;  
and
4. Can execution of an arbitral award proceed when an appeal has been noted against it?

The parties were poles apart in respect of each of the issues. I shall proceed to deal with the issues *seriatim*.

#### **1. Whether the matter is urgent**

The first respondent’s contention is that the matter is not urgent because having noted its appeal in June, 2011, the applicant should have gone a step further and applied for a stay of execution in the Labour Court in terms of s 92 E (3). It did not do so. Also, having been served with notice of the chamber application for the registration of the arbitral award, the applicant, instead of approaching this court on an urgent basis, simply wrote a letter to the registrar exposing its wrong interpretation of the law saying:

“... we feel that that it is unprocedural and unlawful to register an award that has been appealed against.”

The urgency is self-created because the applicant only acted following attachment of its goods on 17 January, 2012.

I do not think that I should be detained by the ancillary counter arguments like the applicant believed that the noting of the appeal suspended operation of the arbitral award or that on the authority of *Benson Samudzimu v Dairiboard Holdings Limited* HH 204/10 it would have been an exercise in futility for the applicant to oppose the registration of the arbitral award or that the applicant believed that it was not the first respondent’s employer.

The real issue is that the need to act arose when the applicant's property was attached on 17 January, 2012. The often cited case of *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (HC) is instructive. At p 193, CHATIKOBO J said:

“What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait.”

Following the attachment, the applicant filed the urgent chamber application on 24 January, 2012. Prior to that the applicant was not legally represented so it had to instruct counsel to lodge this application. It cannot be said that the delay of seven days was inexcusable or inordinate. I do not think that it would have been proper for the applicant to have approached this court on an urgent basis at the stage when the application for the registration of the award had been served upon it as contended for by the first respondent. That would have been pre-mature. Accordingly the matter is held to be urgent.

## **2. Whether the applicant is the first respondent's employer**

I am constrained not to delve into the merits and demerits of the argument presented in respect of this issue on the ground that I do not wish to pre-empt what the Labour Court is going to decide in the appeal pending before it for this is one of the grounds of that appeal. Suffice to state at this juncture that in the event that it is found that the applicant is not the first respondent's employer but the Ministry of Health/Public Service Commission then it would inevitably follow that by invoking the Labour Act instead of the Health Services Regulations SI 117/06 the warrant of execution which the first respondent is wielding against the applicant was borne out of a flawed process and should therefore not be carried to fruition. This then constrains me to be inclined to grant the provisional order to avoid possible irreparable harm being occasioned to the applicant. Even the balance of convenience favours that route.

## **3. Whether applicant's appeal against the arbitral award is properly before the Labour Court**

Again I am of the considered view that this issue will feature prominently in the appeal before the Labour Court so this court should not be seen to be prejudging the issue. It is best to leave it for the determination of the Labour Court.

**4. Whether execution of an arbitral award can proceed when an appeal has been noted against it**

This is the nub of the dispute between the parties. In a wide-ranging but detailed judgment GOWORA J (as she then was) in the *Sibangilize Dhlodhlo* case *supra*, held, correctly in my view, that once an arbitral award has been appealed against, it is not capable of being executed. The way the learned judge articulated the difference in meaning and effect between the provisions encompassed in s 92 D and 92 E of the Labour Act on the one hand and those in s 98 (10) on the other and the authorities cited at pp 10 and 11 of the cyclostyled judgment buttressing the presumption that in interpretation of statutes, Parliament does not intend to alter the common law unless it expresses its intention with irresistible clarity, sounds both attractive and a correct exposition of the law as it currently stands on the subject. I respectfully subscribe to it.

In the event, it matters not that the appeal against the arbitral award currently pending before the Labour Court is properly before it or not. What matters at this juncture is simply that the arbitral award has been appealed against and since s 98 (1) of the Labour Act, in contradistinction to s 92 E does not provide for the suspension of an arbitral award the moment it is appealed against, the common law principle of suspending the operation of a judgment appealed against comes into play.

In the result, I find no difficulty in granting the urgent chamber application in terms of the draft order annexed thereto.

*Dzimba, Jaravaza & Associates*, applicant's legal practitioners

*Hungwe & Partners*, 1<sup>st</sup> respondent's legal practitioners